Supreme Court, U.S.
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RECORD NO.

In the

Supreme Court of the United States

October Term, 2004

ALBERT L. FREEMAN,

Petitioner,

– v. –

DUKE POWER COMPANY,
A division of Duke Energy Corporation; Duke Energy Corporation,

Respondents.

ALBERT L. FREEMAN,

Petitioner,

– v. –

CINDY THAXTON and GEORGE KWASCHA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In July of 1999, after having twice unsuccessfully attempted to terminate the employment of Petitioner Albert L. Freeman for "moonlighting" Respondent Duke Power terminated Mr. Freeman's employment for allegedly breaching a "no-moonlighting" agreement between Freeman and Duke Power. Respondents Thaxton and Kwascha orchestrated and recommended the discharge of the Petitioner Freeman. Freeman brought two separate actions in North Carolina state court. The Respondents removed the cases to U.S. District Court.

The U.S. District Court dismissed both of Petitioner Freeman's state law actions, one against Duke Power Company and one against Cindy Thaxton and George Kwascha, on the bases that all of the state law claims raised in the two cases were either preempted by *§301* of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. The U.S. Court of Appeals for the Fourth Circuit affirmed. The following questions are presented:

1. Did the Fourth Circuit err in holding, in conflict with the decisions of this Court, that the Freeman Agreements were not independent of the collective bargaining agreement and, therefore, were preempted by §301 of the Labor Management Relations Act?

2. Did the Freeman Agreements constitute "last chance agreements" and, thus, "contracts" under §301 of the LMRA?

3. Did the Fourth Circuit err in holding, in conflict with its own decisions and decisions of this Court, that Freeman's claim for tortious interference with contract was both preempted by §301, LMRA, and, simultaneously, failed to state a valid §301 claim?

4. Did the Fourth Circuit err in holding that its decision in *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992)*, simultaneously preempted and barred a state law tort claim for tortious interference with contract?

5. Did the Fourth Circuit err, in departing form the accepted course of judicial proceedings, by overlooking the material legal matter that the Petitioner-Appellant's state law claim for interference with contract stated a claim upon which relief can be granted?

6. Did the Fourth Circuit err, in departing form the accepted course of judicial proceedings, by overlooking the material legal matter that the Petitioner-Appellant's state law claim for unfair and deceptive trade practices stated a claim upon which relief can be granted?

PARTIES TO THE PROCEEDING

The parties to these proceedings are set forth in the case captions. Petitioner Freeman was the Petitioner-Appellant in both cases below. Respondents were Respondents-Appellees in their respective case below.

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INTRODUCTION

In July of 1999, after having twice unsuccessfully attempted to terminate the employment of Petitioner Albert L. Freeman for "moonlighting", Respondent Duke Power terminated Mr. Freeman's employment for allegedly breaching a "no-moonlighting" agreement between Freeman and Duke Power. Respondents Thaxton and Kwascha orchestrated and recommended the discharge of the Petitioner Freeman.

Petitioner Freeman brought an action in North Carolina state court against Duke Power. Petitioner Freeman brought a separate state court action against Thaxton and Kwascha. Respondents in both cases removed the cases to the U.S. District Court. The U.S. District Court dismissed both of Petitioner Freeman's state law actions on the bases that all of the state law claims raised in the two cases were either preempted by *§301* of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. The U.S. Court of Appeals for the Fourth Circuit affirmed.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit in these consolidated cases is an unpublished opinion. *Albert L. Freeman v. Duke Power, et al., 03-2146, CA 00-665-1 (4 Cir., September 27, 2004); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 03-2147, CA-02-630-1 (4 Cir., September 27, 2004).* The decision of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing and Rehearing En Banc is unreported. *Albert L. Freeman v. Duke Power, et al., 03-2146, CA 00-665-1 (4 Cir., October 26, 2004); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 03-2147, CA-02-630-1 (4 Cir., October 26, 2004).* The decision of the U.S. District Court in these

consolidated cases is unreported. *Albert L. Freeman v. Duke Power, et al., 1:00CV00665 (MDNC, August 15, 2003); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 1:02CV00630 (MDNC, August 15, 2003).*

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment in the consolidated cases on September 27, 2004. The Court of Appeals denied Mr. Freeman's petition for rehearing and rehearing en banc on October 26, 2004. Petitioner now files this Petition for Writ of Certiorari. This Court has jurisdiction under *28 U.S.C. §1254(1).*

STATEMENT OF THE CASE

Petitioner Freeman filed the first underlying action on June 30, 2000, in the General Court of Justice, Superior Court Division, Alamance County, North Carolina. Petitioner Freeman alleged several causes of action against Duke Power, including breach of contract, wrongful discharge, a violation fo the N.C. Constitution, and bad faith discharge.

Petitioner Freeman filed the second underlying action on June 28, 2002, in the General Court of Justice, Superior Court Division, Alamance County, North Carolina. Petitioner Freeman alleged several causes of action against Cindy Thaxton and George Kwascha, including interference with contract and unfair deceptive trade practices.

The Respondents in both actions filed notices of removal to the U.S. District Court. The U.S. District Court found that jurisdiction was proper pursuant to §301 of the Labor Management Reporting Act.

A. Facts

No. 03-2146 (Action against Duke Power)

The Petitioner-Appellant Freeman was first employed by Duke Power in June, 1983, as a Transmission Line helper (Jt. App., p. 9). Approximately eighteen (18) months later, Petitioner-Appellant Freeman transferred to the Burlington operations and assumed the duties of Distribution Line Technician C, i.e., a lineman. Freeman's duties as a Distribution Line Technician included, but were not limited to, the installation of utility poles, troubleshooting interference and after-hour problems, electrical work at transformer boxes on utility poles, the connection of power lines at customers' meter boxes, and lead man over a Duke Power line truck (Jt. App., p. 9). As a Distribution Line Technician, Freeman had minimal contact with the owner's property, i.e., hooking cable from the utility pole to the meter box on the owner's property. As a lineman for Duke Power, Freeman worked the power distribution lines, drove the Duke Power truck, and was paid an initial hourly rate of $7.25 an hour (Jt. App., p. 9-10).

Petitioner-Appellant Freeman is married and now has two (2) children. In 1984, Freeman obtained a limited electrical contractor's license which allowed him to do electrical wiring jobs where the contract amount was less than $25,000.00. Thereafter, Freeman "moonlighted" as an electrician to support his family (Jt. App., p. 10). As an electrician during his off-duty time, Freeman did small electrical wiring jobs, such as installing light fixtures, ceiling fans, telephone jacks, etc. This electrical work was performed primarily in residences and, occasionally, in small businesses. Upon information and belief, other Duke Power employees also "moonlighted" and some of these employees "moonlighted" as electricians. At all relevant times hereto, Duke Power had no policies proscribing "moonlighting" and had negotiated no restrictions on "moonlighting" in the

Union Contract (Jt. App., p. 10).

During the period from 1984 to 1994, Duke Power was aware that Freeman "moonlighted" as an electrician and took no employment action against him (Jt. App., p. 10). In fact, on numerous occasions prior to 1994, Duke Power utilized Freeman's services as an electrician in the rewiring of Duke Power buildings. On occasion, Duke Power even relieved Freeman of his lineman duties so that Freeman could rewire Duke Power buildings during regular business hours. Duke Power acquiesced to, and ratified, Freeman's "moonlighting" (Jt. App., p. 10).

Petitioner-Appellant Freeman was a good employee and performed every aspect of his job satisfactorily at Duke Power. At all times relevant hereto, the Petitioner-Appellant observed and complied with the instructions and regulations of Duke Power and performed loyal and efficient work and service to Duke Power. Freeman's "moonlighting" did not adversely affect either his attendance or his work performance at Duke Power (Jt. App., pp. 10-11).

Duke Power is one of the largest public utilities in the nation whereas Albert Freeman is an individual who was trying to support his family. Freeman's off-duty work as an electrician in Alamance County did not even closely resemble the power distribution services provided by Duke Power to its customers in North and South Carolina. Freeman's "moonlighting" did not have, and could not have had, an adverse economic impact upon Duke Power (Jt. App., p. 11). Freeman's "moonlighting" posed no competitive threat, direct or indirect, to Duke Power. Freeman solicited no work away from Duke Power and did not cause Duke Power resources to be used to advance his "moonlighting." Freeman did not promote, or do, his electrical work during his normal Duke Power working hours, except when specifically requested to perform such services for Duke Power (Jt. App., p. 11).

However, in or about 1990, Duke Power transferred a

district manager, Ed Holt, to Burlington from Reidsville. Holt disliked "moonlighting" in general and Freeman's "moonlighting" in particular. On one occasion in 1993, Holt wrongly accused Freeman of "moonlighting" during his workday at Duke Power. The Petitioner-Appellant is informed and believes and, therefore, alleged that Duke Power, though its agents and employees, embarked upon a course of action to prevent his "moonlighting" and to deny to him and his family the enjoyment of the fruits of his own labor (Jt. App., p. 11).

On or about January 26, 1994, Freeman was suspended and then discharged from his employment as a lineman with Duke Power for allegedly "removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company" (Jt. App., pp. 11-12). While "moonlighting" after hours, Freeman had disconnected the power to a customer's residence and brought the meter box back to Duke Power. Local Union 962, IBEW, filed a grievance under the grievance provision of the Union Contract on behalf of Freeman. Prior to the referral of this grievance to arbitration as provided by the Union Contract, Duke Power and Local 962 settled the grievance and Duke Power "struck a bargain with" Freeman. As part of this settlement, Duke Power placed Freeman under a restrictive employment contract with Duke Power (Jt. App., p. 12).

In settlement of this grievance, Duke Power, Local 962, and Freeman entered into a Grievance Resolution (hereinafter "Agreement") on or about June 20, 1994 (Jt. App., p. 12). Under that Agreement, Duke Power agreed to reinstate Freeman to his position of Distribution Line Technician with no loss of service but with no back pay. The Parties further agreed that, should Freeman thereafter engage directly or indirectly in the business of electrical contracting while employed with Duke Power, Duke Power could terminate Freeman's employment for that reason (Jt. App., p. 12). *The Agreement further provided that Duke Power's decision to discharge Freeman for engaging*

in the business of electrical contracting "shall be final and shall not be subject to review under any grievance or arbitration provision under any Collective Bargaining Agreement in effect at the time of his discharge" (Jt. App., p. 12). The Agreement further provided that Freeman could continue to do small incidental wiring jobs for his close friends or relatives, provided he did not solicit, or advertise for, such work. The Agreement also provided that the resolution with Freeman would not be deemed precedent for similar situations with other employees (Jt. App., pp. 12-13). Upon information and belief, Freeman was singled out by Duke Power while similarly-situated employees were not disciplined for "moonlighting" as electricians or otherwise.

The Defendant-Appellee Duke Power, upon information and belief, drafted this Agreement for signature by the Petitioner-Appellant Freeman. Duke Power drafted the Agreement and the language of the Agreement should be construed strictly against Duke Power.

Petitioner-Appellant Freeman abided by the language of the Agreement, notwithstanding the fact that the Agreement purported to restrain his fundamental right to work and to engage in a lawful business. However, in June of 1996, Duke Power again suspended and proposed to discharge Freeman allegedly for engaging in the business of electrical contracting (Jt. App., p. 13). Duke Power claimed that Freeman had breached the Agreement of June, 1994, which Freeman denied.

In order to resolve this dispute, Duke Power and Freeman, who was represented by his attorney, agreed to an Amendment to the Grievance Resolution (hereinafter "Amended Agreement"), dated July 3, 1996 (Jt. App., pp. 13-14). The Amended Agreement provided that Freeman was prohibited from being or becoming employed on a full or part-time basis with any person, firm, or corporation engaging in the business of electrical contracting (Jt. App., p. 14). The "business of electrical contracting" was defined in the Amended Agreement

as "owning and operating a business for the purpose of profit by providing electrical contracting services." The Amended Agreement further provided that Freeman "will not take out any electrical permit or permit for the purpose of electrical wiring in his name under his electrical contractor's license except as necessary for Mr. Freeman to perform electrical work on property he owns" (Jt. App., p. 14). The Amended Agreement also provided that Freeman "may wire any property which he either individually or with his spouse owns, with the exception of any houses being built for resale" (Jt. App., p. 14).

The Respondent-Appellee Duke Power, upon information and belief, drafted the Amended Agreement which was executed by Freeman on or about July 3, 1996. Duke Power agreed not to terminate Freeman's employment for the alleged reason of engaging in the business of electrical contracting prior to July 3, 1996. In return, Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting in the future. Notwithstanding the fact that Duke Power had authored the language of the earlier Agreement, Duke Power sought to make the language of the Amendment even more restrictive in 1996. Upon information and belief, Duke Power realized that the language of the Agreement was unclear and sought to "tighten the noose" around the Petitioner-Appellant and his means of supporting his family with the Amended Agreement (Jt. App., p. 14).

Freeman abided by, and complied with, the language of the Amended Agreement. Nonetheless, in July of 1999, after having twice unsuccessfully attempted to discharge Freeman for the same reason, the Respondent-Appellee Duke Power, through Respondents George Kwascha and Cindy Thaxton, suspended and then terminated Freeman's employment for allegedly breaching the Amended Agreement. Freeman denied that he had breached the language of the Amended Agreement (Jt. App., p. 15). Local 962 declined to file a grievance and referred Freeman to Duke Power.

Freeman made demand upon Duke Power to reinstate him to his job position with no loss in service. Duke Power refused to do so.

No. 03-2147 (Action against Thaxton and Kwascha)

Respondents-Appellees Thaxton and Kwascha, management employees with Duke Power, disliked Freeman, resented his large home in Elon College, the property holdings of Freeman and his spouse, and his affluent lifestyle, and harbored personal hostility and ill-will towards Freeman (Jt. App., p. 231).

In July of 1999, Respondents-Appellees Thaxton and Kwascha, without proper investigation and without a thorough review of the facts, suspended Freeman from his job duties, recommended his dismissal, and orchestrated the termination of Freeman's employment from Duke Power for allegedly "moonlighting" (Jt. App., p. 231).

Thaxton and Kwascha exceeded their authority, in order to prevent the continuation of Freeman's employment with Duke Power, by unfairly singling Freeman out due to his success and actively seeking a pretext to wrongfully discharge Freeman for the business activity of "moonlighting" (Jt. App., p. 231).

The acts and conduct of Thaxton and Kwascha were done outside the scope of their employment, in bad faith, for a wrongful purpose, with malice, without any legal justification, and for a reason not reasonably related to the protection of a legitimate business interest (Jt. App., p 232).

Respondents-Appellees' unfair and deceptive acts and conduct in causing the discharge of Freeman for alleged "moonlighting" affected commerce and were acts and practices "in or affecting commerce" and constitute unfair and deceptive trade practices, which are proscribed by Chapter 75-1.1 of the North Carolina General Statutes (Jt. App., p. 233).

B. Proceedings Below

Freeman brought an action in North Carolina state court against Duke Power, alleging breach of contract, wrongful discharge, violation of North Carolina's Constitution, and bad faith discharge. He brought a separate state court action against Cindy Thaxton and George Kwascha, his immediate supervisors, for interference with contract and violation of North Carolina's unfair and deceptive trade practices act. The Respondents in both cases removed the cases to U.S. District Court and filed motions to dismiss the cases for failure to state a claim. The Respondents also sought to consolidate the cases in the U.S. District Court. Petitioner Freeman resisted the motions and moved to remand the cases back to state court, to amend his complaint, to exclude evidence attached to the Respondents' motions to dismiss, and to conduct discovery.

1. The District Court.

The U.S. District Court denied Freeman's motion to remand the cases to state court because the court determined that the complaints in both cases raised issues arising under federal law, specifically the LMRA. The court determined that Freeman's claims against Duke Power for breach of contract and wrongful discharge were preempted by §301 of the LMRA and granted the Respondents' motions to dismiss. The District Court denied Freeman's motion to amend his complaint to allege that he was an at-will employee because the Court concluded that the allegation would not have changed the fact that the claim was preempted Section 301, LMRA. The District Court dismissed the bad faith discharge and state constitutional claims as failing to state claims cognizable under North Carolina law.

The District Court determined that Freeman's claim against the individual Respondents for interference with

contract was also preempted by the LMRA and subject to dismissal. It determined that, even if the unfair and deceptive trade practices claim was not preempted by the LMRA, such a claim was unavailable under North Carolina law in the employment setting. The District Court found that the Respondents' motions to consolidate and Freeman's motions to exclude evidence and conduct discovery were all mooted by the dismissals. Petitioner Freeman appealed.

2. The Court of Appeals.

The U.S. Court of Appeals affirmed the judgment of the U.S. District Court in both consolidated cases.

No. 03-2146 (Action against Duke Power)

In affirming, the U.S. Court of Appeals for the Fourth Circuit found that, although disputes arising over independent employment contracts unrelated to a CBA are not preempted by *§301* of the LMRA, *see Caterpillar Inc. v. Williams, 482 U.S. 386, 394-95 (1987)*, the Grievance Resolution and the Amendment at bar were not independent of the CBA. The Court of Appeals noted that the employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n.9. The Court of Appeals than concluded that the same could not be said in the instant case, "as the Grievance Resolution and Amendment derive their 'entire vitality and legitimacy' from CBA," citing *Davis v. Bell Atlantic-West Virginia, Inc., 110 F.3d 245, 248 (4th Cir. 1997).*

No. 03-2147 (Action against Thaxton and Kwascha)

In affirming, the U.S. Court of Appeals observed that, Applying the most natural interpretation of this language, we [have previously held] that a suit against a non-signatory of a contract cannot be considered a suit for violation of the contract. *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992).* Bound, as both it and we are by prior controlling and unquestioned circuit precedent, the district court properly dismissed Freeman's claim against Thaxton and Kwascha for interference with contract. (Opinion, p. 12).

The Fourth Circuit further observed that,

> Although *N.C.G.S. §75-1.1(b)* defines "commerce" broadly as "business activities, however denominated," the Supreme Court of North Carolina has cautioned that the act "is not intended to apply to all wrongs in a business setting," including most employment disputes. *Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001),*(distinguishing Sara Lee on the basis that the employee in Sara Lee owed a fiduciary duty to his employer, and the employee was entrenched in a buyer-seller relationship with his employer, which fell squarely within the purview of the unfair trade practices act). Freeman's allegations that the Respondents caused Duke Power to terminate him fails to meet the requirement that the Respondents' acts be in or affecting commerce, *see Durling v. King 554 S.E.2d 1, 4-5 (N.C. Ct. App. 2001)* (affirming summary judgment where "no evidence was presented that the subject transactions had any impact beyond the parties' employment relationships"), and he therefore failed to state a claim under the state unfair and deceptive trade practices act. (Opinion, p. 13).

The U.S. Court of Appeals affirmed the district court's order denying Freeman's motions to remand and dismissing Freeman's complaints against Duke Power and against Thaxton and Kwascha. The U.S. Court of Appeals also affirmed the district court's denial of the various pending motions as the dismissal of all claims made the motions moot.

REASONS FOR GRANTING THE WRIT

No. 03-2146 (Action against Duke Power)

I. The U.S. Court of Appeals for the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions, and this case presents questions of exceptional importance that have not been, but should be, resolved by this Court.

The Fourth Circuit's decision in the case at bar conflicts with a decision of the United States Supreme Court and this proceeding involves one or more questions of exceptional importance in labor law jurisdiction which should be resolved by this Court.

A. The Fourth Circuit's decision conflicts with the decision of the United States Supreme Court in *Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)*.

Employees covered by collective-bargaining agreements are entitled "to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987).

Citing *Caterpillar, Inc. v. Williams, supra,* the Fourth

Circuit conceded that disputes arising over independent employment contracts unrelated to a CBA are *not* preempted by Section 301 of the LMRA. (Opinion, p.6). However, the Fourth Circuit distinguished *Caterpillar* from the instant case (Opinion, p.7).

Private employment agreements may borrow terms from a collective-bargaining agreement without bringing the private agreement within the scope of Section 301 of the LMRA. *Marion v. Virginia Elec. & Power Co.*, 52 F.3d 86, 89 (4th Cir. 1995). This is especially so, where as here, the resolution of the claim did *not* depend on the meaning of, or require the interpretation of, a collective-bargaining agreement[1]. The Freeman Agreements do not implicate provisions of the collective-bargaining agreement nor is the subject matter of these Agreements (i.e., moonlighting) covered by the collective-bargaining agreement. The Freeman Agreements specifically provided that disputes would *not* be resolved under the grievance and arbitration provisions of the collective-bargaining agreement. Hence, *no* interpretation of the collective-bargaining agreement would necessarily be involved.

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[1] The Respondents-Appellees argued that *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 248 (4th Cir. 1997) "implicitly" held that a grievance settlement agreement was a contract within the preview of Section 301 of the LMRA. *However, the complaint in that case specifically alleged a breach of the collective-bargaining agreement which clearly provided Section 301 pre-emption.* While the language of the *Davis* opinion concerning the settlement agreement appears to be *dicta*, an interpretation of the settlement agreement in *Davis* required reference to terms of the collective-bargaining agreement. Absenteeism and tardiness were covered terms under the collective bargaining agreement. *This is not* so *in the instant case.* As noted by the Respondents-Appellees, no relevant Fourth Circuit or Middle District precedent exists on "last chance" agreements as "contracts" under Section 301 of the LMRA.

The district court specifically noted that it found it unnecessary to consider the settlement agreements and the collective bargaining agreement in reaching its decision (Jt. App., p. 215). The Fourth Circuit affirmed the order of the district court without commenting on this anomaly. Section 301 of the LMRA provides a basis for federal jurisdiction because collective-bargaining agreements provide the alternative and exclusive remedy of arbitration. *See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985).* As noted above, the Supreme Court in *Allis-Chalmers* emphasized that, "[W]e [do not] hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Id.* at 1916. Moreover, the *Allis-Chalmers'* reliance on arbitration does not apply here. Under the private agreements, Mr. Freeman did not have access or recourse to the grievance and arbitration procedures of the collective-bargaining agreement. The collective-bargaining agreement in this case provided the Petitioner-Appellant with no remedy at all. "It would be anomalous to hold that Section 301 preempts his state remedies because federal law provides the exclusive remedy, only then to discover that Petitioner-Appellant had no remedies under federal law." *Scott v New United Motor Mfg., Inc.*, 632 F.Supp. 891, 894 (N.D.Cal. 1986).

The Fourth Circuit's decision conflicts with the decision of the United States Supreme Court in *Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).* This Court should grant review to resolve this conflict.

B. This case involves one or more questions of exceptional importance in labor law jurisprudence that has not been, but should be, settled by this Court.

Case No. 03-2146 raises the important question of whether or *not* the settlement agreements in the case at bar were "last chance agreements" as that term is used in labor law jurisprudence. No relevant Fourth Circuit precedent exists on "last chance agreements" as "contracts" under Section 301 of the LMRA. The Respondents-Appellees argued that the agreements in the instant case were "last chance agreements." (Respondents-Appellees Brief, pp. 15-19). In its Opinion, the Fourth Circuit relied upon *Davis v. Bell Atlantic-W.Va., Inc, 110 F.3d 245 (4th Cir. 1997),* wherein that Circuit construed a settlement agreement as a "rider to the CBA" (Opinion, p. 6). No Fourth Circuit law exists on the difference, if any, between a "rider" and a "last chance agreement" to a CBA. It is unclear as to whether or not the Fourth Circuit in the case at bar found the agreements at issue to be "riders" or " last chance agreements," or none of the above. This question is of exceptional importance in labor law jurisprudence. This Court should grant review to resolve this important question of federal law.

No. 03-2147 (Action against Thaxton and Kwascha)

II. The U.S. Court of Appeals for the Fourth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

In the action against Thaxton and Kwascha, the U.S. Court of Appeals for the Fourth Circuit has decided an important question of §301, LMRA, preemption of state law tort claims involving claims against employees in their individual capacities. The Petition for Writ of Certiorari should be granted to resolve this question and to secure and

maintain the uniformity of the decisions of this Court.

A. The decision of the Fourth Circuit conflicts with that Court's decision in *Jackson v. Kimel, 922 F.2d 1318, 1327 (4 Cir 1993).*

The Opinion of the Fourth Circuit is in conflict with its decision in *Jackson v. Kimel, 922 F.2d 1318, 1327 (4th Cir. 1993),* and that conflict is *not* addressed in the Opinion.

The U.S. Court of Appeals for the Fourth Circuit, in *Jackson v. Kimel, 992 F.2d 1318, 1327 (4th Cir. 1993)*, held that a North Carolina tort claim against an individual supervisor was *not* properly removed to federal court. In *Jackson, supra,* the Court of Appeals reversed the judgment of the U.S. District Court that an intentional infliction of emotional distress claim against a supervisor in his individual capacity was preempted by § 301 of the LMRA. In finding *no* preemption, this Court of Appeals stated that,

> In this case, interpretation of the collective bargaining agreement is not necessary to determine whether Kimel owed a duty to refrain from the alleged conduct; the collective bargaining agreement could not authorize his alleged behavior.
>
> *Id.* at 1327.

In a concurring opinion in *Jackson*, Circuit Judge Phillips noted that, "None of the Supreme Court decisions establishing the contours of § 301 preemption of state law tort claims involved either original or removed claims against employees in their individual capacities." *Jackson* at 1328, fn.1. Circuit Judge Phillips further noted that,

> So far as I know, neither the Supreme Court nor we

> ever have held that a union employee's state-law tort claim against a fellow-employee that is removed pendent to a joined tort claim against the employer is subject, like the claim against the employer, to being 'recharacterized' by preemption as a § 301 claim and so made subject to federal defenses unique to such a claim.
>
> *Id.* at 1328.

Finding that such claims should *not* be subject to § 301 preemption, Judge Phillips warned that,

> *An almost scandalous consequence would be* that by that means a fellow-employee defendant to a meritorious state-law tort action would be enabled, following removal of the pendent claim against him, *to defeat it by invoking § 301 defenses (failure to exhaust grievance procedures, short limitations period) that are only available to one who properly can be charged as a signatory with breaching a labor contract.*
>
> *Id.* at 1328 (Emphasis added).

In the instant case, the Petitioner-Appellant's Verified Complaint was based on state law, was *not* inextricably intertwined with construction and application of the terms of the collective bargaining agreement, and involved purely factual questions concerning the conduct of the Petitioner-Appellant and the conduct and motivation of the individual Respondents. The Petitioner-Appellant's state law claims for interference with contract and unfair and deceptive trade practices were *not* pre-empted by the LMRA.

As Circuit Judge Phillips stated in *Jackson*, *supra,* "None of the Supreme Court decisions establishing the contours of § 301 preemption of state law tort claims involved either original or removed claims against employees *in their individual capacities*." *Jackson* at 1328, fn.1 (Emphasis added).

Mr. Freeman sued Thaxton and Kwascha as *individuals*. Neither were signatories to the agreements at issue in Case No. 03-2146, the action against Duke Power. Case No. 03-2147, the action against Thaxton and Kwascha, concerned the conduct and motivation of Thaxton and Kwascha and, thus, did *not* require or depend upon an interpretation of the CBA. Contrary to the Opinion of the Fourth Circuit, *no* interpretation of the extent of Thaxton and Kwascha's supervisory authority as defined in the CBA was required (Opinion, pp. 8-9). The "almost scandalous consequence" which Judge Phillips warned of in *Jackson v. Kimel, supra, at 1328,* resulted in Case No. 03-2147. This Court should grant review to resolve this conflict and to settle this important question of federal law.

B. An injust and harsh result arises from the decision of the Fourth Circuit because Mr. Freeman is left without remedy against Thaxton and Kwascha.

The Fourth Circuit overlooked the material legal matter that Mr. Freeman is left without a remedy against Thaxton and Kwascha as a result of the Fourth Circuit's decision. The decision works an injustice upon Mr. Freeman because the Fourth Circuit's decision bars a federal cause of action for tortious interference with an employment agreement against nonsignatories to that

agreement (i.e., Thaxton and Kwascha) and, simultaneously, preempts a similar cause of action premised upon state law.

On the one hand, the Fourth Circuit relied upon this Court's decision in *International Union, UMWA v. Convenant Coal, 977 F.2d 895 (4th Cir. 1992)*, in holding that Mr. Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted by Section 301 of the LMRA (Opinion, p. 9). On the other hand, the Fourth Circuit relied upon the very same decision in *Covenant Coal Corp., supra,* to hold that the district court properly dismissed Freeman's claim against Thaxton and Kwascha for interference with contract (Opinion, p. 12).

The Fourth Circuit, in *International Union, UMWA v. Convenant Coal, 977 F.2d 895 (4th Cir. 1992),* observed that,

> We are cognizant of the apparent paradox, inherent in our decision of this case, holding that Section 301of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action. This result is not as harsh as it would initially appear, however, because the Union is not left without remedy. . .Because an adequate forum exists for resolution of the Union's claims, we discern no injustice in the finding that section 301 of the LMRA serves both to bar a federal cause of action for tortious interference with a collective bargaining agreement against a non-signatory of that agreement, and to preempt a similar cause of action premised on state law.

Id. at 899-900.

In another case cited by the Fourth Circuit in its Opinion, *Kimbro v. Pepsico, Inc., 215 F.3d 723 (7th Cir. 2000)*, the Seventh Circuit of Court of Appeals also observed that,

> It is true that in a case in which the defendant is not a party to the contract, the extinction of state causes of action is questionable because it could leave the Petitioner-Appeallant remediless.

Id. at 727.

The Fourth Circuit's decision leaves Mr. Freeman without a remedy against Thaxton and Kwascha. This is a harsh and unjust result. This Court should grant review to resolve this conflict and to settle this important question of federal law.

C. The decision of the Fourth Circuit departed from the accepted course of judicial proceedings by overlooking the material legal matter that the Petitioner-Appellant's state law claim for interference with contract stated a claim upon which relief can be granted.

The Petitioner-Appellant's Complaint stated a valid claim for interference with contract (Jt. App., pp. 231-232). The Verified Complaint alleged the requisite elements of the tort of interference with contract by Thaxton and Kwascha. In particular, the Verified Complaint alleged that the acts and conduct of Thaxton and Kwascha were done outside the scope of

their employment, in bad faith, for a wrongful purpose, with malice, without any legal justification, and for a reason not reasonably related to the protection of a legitimate business interest (Jt. App., p. 232); *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239-240 (2001).

In *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239-240 (2001), the North Carolina Court of Appeals held that, with respect to a claim for tortious interference with contract, "non-outsider" status does *not* insulate an individual defendant from liability where the defendant acts without a reasonable-good faith motive. *Bloch, supra*, at 239-240. Bad motive or wrongful purpose is the essence of a claim for tortious interference with contract.

The Petitioner-Appellant's claim for tortious interference with contract stated a claim under North Carolina law which the Fourth Circuit overlooked in concluding that the district court properly dismissed Mr. Freeman's claim against Thaxton and Kwascha for interference with contract.

D. The decision of the Fourth Circuit departed from the accepted course of judicial proceedings in overlooking the material legal matter that the Petitioner-Appellant's state law claim for unfair and deceptive trade practices stated a claim upon which relief can be granted.

Petitioner-Appellant also alleged in his Verified Complaint[2] that the Respondents' unfair and deceptive acts

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[2] In paragraph 11, page 3, of the Petitioner-Appellant's Verified Complaint, the Petitioner-Appellant alleged that the Respondents

and conduct in causing his discharge for alleged "moonlighting" *affected commerce* and were acts and practices "in or affecting commerce" and constituted unfair and deceptive trade practices, which are proscribed by Chapter 75-1.1 of the North Carolina General Statutes (Jt. App., pp. 232-233).

The North Carolina Supreme Court in, *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), held that the employment relationship does *not* preclude the applicability of N.C.G.S. § 75-1.1 *et seq*. As Justice Orr stated, the defendant's "mere employee status at the time he committed these acts does not safeguard him from liability under the Act." *Id.* at 34. The North Carolina Supreme Court found that the relevant inquiry was whether or not the business activities and occurrences at issue were "in or affecting commerce." *Id.* at 32.

Contrary to the findings of the Fourth Circuit (Opinion, pp. 12-13), Mr. Freeman alleged that the acts of Thaxton and Kwascha affected commerce, i.e., the business activity of moonlighting, *and not just his employment relationship* (Jt. App., p. 233, paragraph 24). The acts of Thaxton and Kwascha had an impact beyond the employment relationship, affected the consuming public, and had the effect of chilling the practice of moonlighting.

The Petitioner-Appellant's claim for unfair trade practices stated a claim under North Carolina law which the Fourth Circuit overlooked in affirming the order of the district court dismissing Mr. Freeman's claim for unfair and deceptive trade practices.

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unfairly singled him out due to his success and sought a pretext to wrongfully discharge him for the *business activity* of "moonlighting" (Jt. App., p. 154).

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted and the judgment below reversed.

Respectfully submitted,

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